

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7535

Investigation into: (1) petition of AARP, for the)
establishment of reduced rates for low-income)
consumers of Green Mountain Power)
Corporation and Central Vermont Public)
Service Corporation; and (2) as expanded to)
possibly include general applicability to all)
Vermont retail electric utilities)

Order entered: 10/15/2009

PROCEDURAL ORDER

I. BACKGROUND

In this Order, I resolve a discovery dispute between Vermont Marble Power Division of Omya, Inc., ("VMPD") and AARP and rule on a motion for a status conference and suspension of the schedule.

On August 11, 2009, I issued a procedural Order (the "Scheduling Order") in this docket that set September 30, 2009, as the date for commencement of formal discovery in this proceeding, as well as the date on which the first round of discovery was to be served on AARP.

On September 21, 2009, the Vermont Public Service Board ("Board") issued an Order in which it expanded the scope of this docket and ordered all Vermont retail electric utilities to participate in this proceeding and to enter notices of appearances. VMPD filed its notice of appearance on September 23, 2009.

On October 1, 2009, VMPD served a set of discovery requests and requests for admission upon AARP. Shortly thereafter on that same day, VMPD received an electronic message from AARP indicating that it viewed VPMD's discovery as untimely because it was served one day after September 30th, the deadline in the Scheduling Order, and therefore AARP would not

respond to VMPD's discovery requests absent an order from the Board directing such a response. VMPD followed up on this communication with AARP, offering an extension of time to respond to VMPD's discovery, and otherwise seeking clarification as to whether or not AARP would answer VMPD's discovery requests. AARP did not respond to VMPD's inquiry.

On October 2, 2009, VPMD filed with the Board a motion entitled *Motion to Permit the Filing and Service of Interrogatories, Requests to Produce and for Admission Served on AARP and Motion to Compel* (the "VMPD Motion"). In its motion, VMPD requested leave to serve discovery requests on AARP as of October 1, 2009, as well as an order to compel responses to these requests from AARP.

On October 5, 2009, the Group of Municipal Electric Utilities ("GMEU") filed a motion seeking a status conference in this docket and to briefly suspend the existing Scheduling Order. GMEU explained that both the conference and the suspension of the schedule would aid the parties in accommodating the new, substantive implications posed by the Board's decision to expand the scope of the docket.

On October 7, 2009, AARP filed a reply to the VMPD Motion, arguing that the Scheduling Order had unambiguously established September 30, 2009, as the deadline for propounding the first round of discovery to AARP in this docket, and that therefore VMPD was late when it served discovery upon AARP the next day, on October 1, 2009. AARP further indicated that it opposed GMEU's suggestion to suspend the existing Scheduling Order, but agreed that a status conference would be helpful to discuss possibly amending the Scheduling Order.

Also on October 7, 2009, VMPD filed a surreply to AARP's reply to the VMPD Motion, arguing that equitable considerations militated in favor of allowing its first round of discovery to be served and requiring answers from AARP. VMPD also stated that it supported GMEU's motion for a status conference to discuss the changed scheduling needs for this docket in light of the newly-expanded scope.

II. DISCUSSION

At this time, there are three procedural motions pending before me: (1) VMPD's motion for leave to serve discovery and to request admissions; (2) VMPD's motion to compel discovery

responses from AARP; and (3) GMEU's motion for status conference and suspension of the existing procedural schedule.

VMPD's Motion for Leave to Serve Discovery

The Scheduling Order issued on August 11, 2009, uses the following language to establish a deadline for other parties to serve a first round of discovery upon AARP:

September 30, 2009 Formal discovery begins – 1st round discovery on AARP¹

VMPD interpreted this phrase to mean that September 30, 2009, marked the first day of the period of time in which a first round of discovery could be served, as opposed to a fixed cut-off date for serving a first round of discovery.² Therefore, VMPD does not concede that it was untimely in propounding its first round of discovery to AARP on October 1, 2009.

AARP counters that VMPD's discovery was untimely as served on October 1, 2009, because the Scheduling Order on its face set September 30th as the cut-off date for serving the first round of discovery. Citing V.R.C.P. 6(b), AARP asserts that VMPD has failed to make the requisite showing of "excusable neglect" in order to obtain an enlargement of time at this point to serve its first round of discovery upon AARP.³

In response, VMPD argues that AARP had improperly sought to invoke the "excusable neglect" standard, and that if indeed VMPD misread the Scheduling Order in concluding that it could serve discovery on October 1, 2009, then that mistake was due to lack of clarity in the language of that Order, and considerations of equity should prevail in allowing VMPD's first round of discovery upon AARP to go forward.

1. Docket 7535, *Petition of AARP, pursuant to 30 V.S.A. § 218(e), for the establishment of reduced rates for low-income consumers of Green Mountain Power Corporation and Central Vermont Public Service Corporation*, Order of 8/11/09 at 2.

2. *Vermont Marble Power Division of OMYA Inc. Motion to Permit the Filing and Service of Interrogatories, Requests to Produce and for Admission Served on AARP and Motion to Compel* dated 10/1/09 at 2

3. *Reply by AARP to OMYA Motion to Permit Late Filing of Discovery and OMYA Motion to Compel* dated 10/7/09 at 1-3.

Having considered the arguments made by VMPD and AARP, I have concluded that it is not necessary to resolve whether it was an act of "excusable neglect" for VMPD to have served its first round of discovery upon AARP on October 1, 2009. The language of the Scheduling Order is reasonably clear in establishing September 30th as the cut-off date for serving the first round of discovery in this proceeding. Significantly, the Scheduling Order makes no mention of providing for "rolling discovery" — the term that is ordinarily used in Board proceedings when the parties are authorized to serve discovery at will during a specified period of time, as opposed to being bound by specific start and end dates.⁴ I am mindful, though, that VMPD was not present and did not participate in the prehearing conference that was convened in this docket on August 4, 2009, the principal purpose of which was to establish the procedural schedule that was memorialized in the Scheduling Order.⁵ Therefore, unlike the other parties in this proceeding, VMPD may well not have understood that an agreement was reached at that prehearing conference to proceed first with an informal workshop on September 2, 2009, before the onset of the formal phase of this docket, which was to begin on September 30, 2009, with service of the first round of discovery. It therefore appears likely that VMPD made an honest mistake in construing the Scheduling Order to mean that it could serve discovery upon AARP on October 1, 2009.

Rule 26(f) of the Vermont Rules of Civil Procedure provides that a discovery order "may be altered or amended whenever justice so requires." When the Board ordered the scope of this investigation to be broadened on September 21, 2009, it also ordered the participation of all Vermont retail electric utilities with the express purpose of considering "issues that potentially could have general application to all electric utilities in Vermont"⁶ Thus, given that the Board expressly joined VMPD and its fellow Vermont electric utilities in this proceeding for the purpose of soliciting their input into the important public policy questions raised by AARP in

4. See, e.g., Docket 7381, *Petition of Vermont Electric Cooperative, Inc. For Authority to Issue \$11,000,000 in Series 2008 First Mortgage Bonds and to Mortgage Property as Security Therefor*, Order of 2/22/08 at 2 (discovery schedule providing for "formal rolling discovery with one-calendar week turnaround.")

5. *Vermont Marble Power Division of OMYA Inc. Response to AARP Reply to Motion to Permit the Filing and Service of Interrogatories, Requests to Produce and for Admission and Motion to Compel* dated October 7, 2009 at 3. See also Docket 7535, Order of 9/21/09 at 2.

6. Docket 7535, Order of 9/21/09 at 1.

petitioning for the establishment of a program that provides reduced electricity rates for low-income ratepayers, it would make little sense to foreclose VMPD from remedying a mistake and informing its position by denying VMPD the opportunity it has now requested to conduct discovery on AARP. I conclude that, under these circumstances, justice requires that leave be granted to VMPD to serve its first round of discovery upon AARP as of October 1, 2009. AARP's responses to that round of discovery shall be due to be served on VMPD on October 23, 2009.

As for AARP's request for "reasonable witness fees and counsel fees incurred in responding" to the VMPD Motion and first round of discovery, that request is denied as unwarranted under these circumstances.

VMPD's Motion to Compel

In Vermont, a motion to compel discovery is filed pursuant to V.R.C.P. 37, which provides in relevant part:

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery . . . if a party fails to answer an interrogatory submitted under Rule 33, or if a person, in response to a request for production . . . fails to produce, the discovering party may move for an order compelling production . . . in accordance with the request.⁷

Thus, for a motion to compel discovery to be considered properly filed, the motion must satisfy the following predicate elements: (1) reasonable notice to the non-movant that a motion to compel may be filed; and (2) failure of the non-moving party to answer an interrogatory or to respond to a request for production.

Turning first to the element of reasonable notice, I conclude that VMPD afforded AARP such notice. From the face of the VMPD Motion it appears that the events leading to the filing of this motion all transpired in less than 24 hours: on the afternoon of October 1st, counsel for AARP and VMPD exchanged electronic mail communications about their differences, during

7. V.R.C.P. 37(a)(2). V.R.C.P. 37 is applicable to Board proceedings pursuant to Board Rule 2.214(A).

which AARP indicated it would not reply to VMPD's discovery absent a Board order, and by the next morning VMPD had filed a motion to compel.

I am troubled by the hasty pace at which counsel permitted this discovery dispute to escalate. When this issue emerged on October 1st, there was still more than a month remaining before VMPD was due to file any testimony that might be shaped by AARP's discovery responses. There was still time for counsel to confer with each other more deliberately and in good faith, as is their obligation under V.R.C.P. 26(h).⁸ However, in view of AARP's stated unwillingness to cooperate with VMPD to reach a mutually satisfactory resolution, and the fact that AARP invited VMPD to file this motion to compel, I conclude that the notice was reasonable under these circumstances.

Turning next to the issue of whether there was a failure to answer or respond to a request for production, I conclude that the VMPD Motion fails to satisfy this element of V.R.C. P. 37(a)(2). Pursuant to the Scheduling Order, AARP's responses were not due to be served upon any party until October 13, 2009. Thus, as of October 2nd, when the VPMD Motion was filed, AARP was not in default in serving any discovery answers. Accordingly, I conclude that the VPMD Motion was filed prematurely. Therefore, the motion to compel is denied.

GMEU's Motion for a Status Conference and Suspension of the Schedule

On October 7, 2009, the Clerk of the Board sent a memorandum to all parties in this docket establishing October 14, 2009, as deadline for commenting on GMEU's motion for a status conference and a suspension of the schedule in this proceeding. As of that deadline, no party has opposed the proposal to convene a status conference. And, with the exception of AARP, no party has opposed the suspension of the schedule. I therefore grant the motion for a status conference, which shall be convened for the express purpose of discussing the advisability of suspending and revising the existing schedule to accommodate the new substantive scope of this investigation. I ask that the parties confer in advance with each other to attempt to arrive at a

8. V.R.C.P. 26(h) forbids the filing of a motion to compel "unless counsel making the motion has conferred with opposing counsel or has attempted to confer about the discovery issues between them in detail in a good faith effort to eliminate or reduce the area of controversy, and to arrive at a mutually satisfactory resolution."

mutually acceptable revised schedule to propose for review and consideration at the status conference.

SO ORDERED.

Dated at Montpelier, Vermont, this 15th day of October, 2009.

s/J. Riley Allen

J. Riley Allen
Hearing Officer

OFFICE OF THE CLERK

FILED: October 15, 2009

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)